Supreme Court, U.S.
FILED

No. 99-684

IN THE

Supreme Court of the United States

JOHN VINCENT,

Petitioner,

v.

DELTA AIR LINES, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FIVE

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

The parties to the proceedings below were Petitioner John Vincent, and Respondent, Delta Airlines.

Respondent, Delta Airlines, Incorporated, has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

John Vincent, a California Workers' Compensation applicant, seeks this Court's review of the California Court of Appeal, Second Appellate District, Division Five Decision that the Writ of Review was premature.

In California, Workers' Compensation is a medically driven system. The parties in the case agreed to resolve the medical issues by use of an Agreed Medical Examiner, Dr. Alexander Angerman, who submitted a report dated February 1, 1996. There is a dispute as to when Mr. Vincent became medically entitled to vocational rehabilitation. Petitioner relies on the February 1, 1996 report. Respondent's position is the determining event was February 7, 1997 when Dr. Angerman's deposition was taken and he conclusively stated that Mr. Vincent was a Qualified Injured Worker. When a doctor states that one is a Qualified Injured Worker from a medical standpoint, the vocational rehabilitation system in California comes into operation.

The Petitioner resigned from his job on or about January 16, 1995. He then moved to Arizona in May of 1995. When he moved, he did not notify the Respondent. Furthermore, at the time he moved, the Petitioner had not been determined to be a Qualified Injured Worker and therefore was not entitled to vocational rehabilitation. The applicant purportedly went to Arizona to enroll at the Glendale Community College. He thereafter enrolled at Arizona State University for a baccalaureate degree in finance.

The first time that the parties became aware that the Petitioner was requesting vocational rehabilitation was on May 1, 1996. This was one year subsequent to the applicant

moving to Arizona. At that point benefits were not initiated because entitlement to benefits had not yet been determined. Petitioner filed a Request for Dispute Resolution on the issue of medical eligibility for rehabilitation on July 23, 1996.

California Labor Code § 4644(g) states that an employer shall not be liable to provide vocational rehabilitation services at a location outside the State, unless upon agreement of the employer and the employee, or upon a Determination by the Rehabilitation Division of Workers' Compensation that those services are more cost-effective than similar services provided in the state.

The Petition does not set forth the fact that the administrative tribunal involved in this case, the Workers' Compensation Appeals Board, has ordered this case back to the Rehabilitation Unit for further development of the record. The Rehabilitation Unit has jurisdiction, to determine whether or not the applicant would be entitled to benefits pursuant to Labor Code § 4644(g). The fact that the case has been ordered back for a determination as to whether or not he would be entitled to benefits is of the utmost relevance. This simply means that this Petition is premature and that the Petitioner herein has not been harmed.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI IS PREMATURE AND DOES NOT WARRANT REVIEW OF THIS COURT.

This action has been remanded to the Rehabilitation Unit for the purposes of fully developing the record as mandated by the Workers' Compensation Appeals Board. The issue of Petitioner's entitlement to vocational rehabilitation benefits under Labor Code § 4644(g) has not been determined.

The Rehabilitation Unit has the initial jurisdiction to resolve any dispute as to entitlement of services. Labor Code § 4645(a); 8 Cal. Code Regs. 10127.

Since the Petitioner has not sought out-of-state services from the Rehabilitation Unit, his request for appellate review is premature. No review can be made at this point as the Petitioner has not availed himself of the administrative procedure. Accordingly, no denial of an award has occurred. At this juncture the Rehabilitation Unit's intentions remain unknown. Clearly, this is not the case of a controversy ripe for judicial intervention.

Mere preliminary, procedural on interim orders are not subject to review, including decisions remanding the case for additional proceedings. *Ewing v. Mytinger and Casselberry*, 339 U.S. 594 (1950).

Proceedings to review an award or denial thereof cannot be initiated prematurely. Where the administrative intention

in a particular situation is unknown, the controversy is not ripe for judicial intervention. *Eccles v. People's Bank of Lakewood Village, California*, 333 U.S. 426 (1948).

Although Petitioner cites several cases for the proposition that a violation of constitutional rights is an exception to this rule, those cases are distinguishable because they involve direct and immediate action and not a distant or remote possibility. There has been no notification that the Rehabilitation Unit will deny Petitioner an out-of-state plan or that they plan to determine the out-of-state plan to not be cost-effective.

Dunn v. Blumstein, 405 U.S. 330 (1972), cited by Petitioner, was subject to judicial review after exhaustion of state administrative remedies. *Dunn*, 405 U.S. 330, 332. Simply, this is a premature request for judicial action and there is no real case or controversy.

II.

PETITIONER'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS CALIFORNIA LABOR CODE § 4644(g) DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BY INFRINGING ON THE RIGHT TO TRAVEL.

A. Equal Protection

The equal protection clause of the Fourteenth Amendment of the U.S. Constitution prohibits a State from denying any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. XIV.

In determining if a state law is discriminatory in its application, the court has dictated tests depending on the classification created by the law and interest involved. The appropriate standard of judicial review is determined by the character of the classification in question, the individual interest affected by the classification, and the governmental interest asserted in support of the classification. *Cf. Williams v. Rhodes*, 393 U.S. 29, 30 (1968).

In the ordinary case, a law will be sustained under the equal protection clause if it can be said to advance a legitimate government interest. This is true even if the law seems unwise or works to the disadvantage of a particular group or if the rationale for it seems tenuous. *Romer v. Evans*, 517 U.S. 620 (1996). In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any statement of reasonably conceivable facts that could provide a rational basis for the classification. *Sullivan v. Stroop*, 496 U.S. 478, 485 (1990); *Bowen v. Gilliard*, 483 U.S. 587, 600-603 (1987); *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 174 (1980); *Dandridge v. Williams*, 397 U.S. 471, 481-485 (1970).

Petitioner advocates that Labor Code § 4644(g) penalizes persons who have exercised their constitutional right to interstate travel. He therefore contends strict scrutiny should apply. However, strict scrutiny is traditionally used when a "suspect" class is involved. Petitioner makes no such argument. In fact no classification, suspect or otherwise, is created by the Statute. It simply sets forth a different procedure to follow to obtain the same rehabilitation benefit out-of-state.

The statute does draw a permissible distinction as to what procedure will be followed if an employee requests an out-of-state plan. It is important to note this distinction was drafted to address a particular situation created by a lack of cost control which directly impacted the economy of the State of California. The history of the workers' compensation system in California is relevant to this inquiry.

Labor Code § 4644(g), was passed as part of major reform to the California Workers' Compensation system. The Legislature recognized costs were excessive and bore no relationship to the quality of benefits provided. Therefore, the Legislature passed major reform legislation effective January 1, 1994. Labor Code § 4644(g) was part of the reform bill.

Nothing in the statute results in a denial of benefits to non-residents of the State of California. Nor does the statute restrict interstate travel of an eligible employee. Rather, the statute provides a means for management of costs and services consistent with the intent of the California Legislature as set forth in Labor Code § 4635.1(a).

The State's interest is clear. Deliver a cost-effective program fair to the employer and employee. If the program occurs out of the State of California, the statute operates to protect all involved including the insurance carrier, the employer, and the out-of-state applicant to insure that services are comparable to those available in California.

Petitioner's reliance on *Hanson v. WCAB*, 18 Cal. App. 4th 1179 (1993) is misplaced. The court in *Hanson* did not find a suspect classification under Labor Code § 3208.3. The court upheld the statute even though it limits benefits

for psychiatric injury to employees who have been working six months or longer. Since there was no suspect classification, strict scrutiny did not apply. The distinction was found to be appropriate and the statute was subject to a rational basis analysis. The court found no violation of the constitutional rights to equal protection or due process of the law.

The requirement to follow a different tract for training is likewise permissible. It is analogous to a traditional employment situation wherein an employee is required by the employer to travel for the purposes of job training. It is a temporary condition, traditionally no longer than six weeks. Such a minor, temporary imposition clearly does not result in any infringement or penalty on the right to travel.

Under the California scheme, the employee is paid while in training and travel costs to the training site along with equipment, supplies, food, lodging and clothing are borne by the employer. 8 Cal. Code Regs. 10125.2. This is true for both in-state and out-of-state programs.

Memorial Hospital v. Miracopa County, 415 U.S. 250 (1974) is distinguishable. In *Miracopa County*, a suspect classification was created by the one-year residency requirement which was a condition to receiving nonemergency hospitalization or medical care at the County's expense. There is no limitation on receipt of vocational rehabilitation benefits here. There is no durational residency requirement and the benefit is not conditioned on residency. Nor is the timing of the receipt of benefits conditioned on residency. More importantly, vocational rehabilitation is not a basic necessity of life as is health care. Thus, *Miracopa* is not on point.

Petitioner additionally relies on *Shapiro v. Thompson*, 394 U.S. 618 (1969). However, in *Shapiro* the court did not declare a one-year residency requirement to be, per se, unconstitutional. 394 U.S. at 683. Rather, the court found the statute penalizes the right to travel by creating a class of citizens who had to wait for benefits because of their recent arrival versus bona fide residents who are entitled to benefits immediately. The case of indigents attempting to relocate to obtain better welfare benefits free from legislative residence requirements is not similar to the case at hand.

Labor Code § 4644(g) does not deny benefits based on residency as Petitioner claims. It sets up a procedure to evaluate and approve training if it is cost effective outside of California. This requirement is not analogous to an unconditional denial of welfare benefits for one year. Those benefits are required to subsist. They are a necessity of life. The option to receive training out of state is not a fundamental right.

Nor does *Dunn v. Blumstein*, 405 U.S. 330 (1972) support Petitioner's claim. *Dunn* is distinguishable in that the Tennessee statute was held invalid because the one year requirement was not necessary to promote a compelling state interest. The state asserted two interests: prevention of voting fraud and maintaining an informed voting public. Neither interest was sufficient to establish a compelling interest to justify infringement on the fundamental right to vote.

The California Statute by contrast, allows benefits to occur out of state, subject only to a finding they are more cost effective. Additionally, the statute puts into place a means by which an employee can obtain due process. First, they may be requested from the employer. If denied, the

employee has redress through the Rehabilitation Unit limited only upon a showing of cost-effectiveness. Following that, the issue may be appealed to the WCAB and ultimately be subject to appellate review of the State courts. Cal. Const. Art. XIV, § 4.

More importantly, Labor Code § 4644(g) provides for application for a second rehabilitation plan which can exceed the $16,000.00 cap provided in subdivision (c) of § 139.5. The exceptions provide an additional safeguard for employees. By statute, second plans can be requested by employees with more than 25% disability, inability to complete a first plan due to unexpected change in medical condition or closure of a training facility or school. Additionally, the Rehabilitation Unit can find that a second Plan is necessary to afford suitable gainful employment. Labor Code § 4644(d)(1)-(3).

The Petitioner has also stated that he is required to remain in California to receive rehabilitation services. This is not a true statement. Labor Code § 4644(g) creates no residency requirement. It simply lays forth a different track for rehabilitation should an individual leave the State of California. The employee is still entitled to the benefit. The Rehabilitation Unit has the authority to order an out-of-state plan, but there is a requirement the plan be cost-effective. The rationale is simply that because the person is outside the State of California it is much harder to monitor the quality and delivery of the benefit in other jurisdictions unfamiliar with California law.

The statute in question here raises no comparable penalty to travel as set forth in *Dunn*, *Miracopa* or *Shapiro*. Employees are free to obtain benefits in California or elsewhere subject only to a showing of cost-effectiveness. This is an imposition, at best, on the benefit and where one receives training is clearly not a limitation on the fundamental right to travel.

B. Privileges and Immunities Doctrine

It is clear that the citizen of one state who travels to other states is entitled to enjoy the privileges and immunities of citizens in the several states. *Corfield v. Coryell*, Fed. Cas. 3,230 (1825). The privileges and immunities clause provides important protections to non-residents who enter a state whether they are there to obtain employment, *Hicklin v. Orbeck*, 437 U.S. 518 (1978), to procure medical services, *Doe v. Bolton*, 410 U.S. 179, 200 (1973), or even to engage in commercial shrimp fishing, *Toomer v. Witsell*, 334 U.S. 385 (1948).

The Clause bars discrimination against citizens of other states where nonresidence is the only substantial reason for the different treatment; it does not preclude disparity of treatment where there are valid, independent reasons for it. *Davis v. Franchise Tax Bd.*, 71 C.A. 3d 998, 1001 (1977).

The courts have found that there may be a substantial reason for requiring statutory distinctions amongst citizens for the payment of fees such as a hunting license, *Baldwin v. Fish and Game Comm'n of Mont.*, 436 U.S. 371, 390-391 (1978), or to enroll in the state university, *Vlandis v. Kline*, 412 U.S. 441, 445 (1973). Thus, distinctions amongst citizens do not, per se, create impermissible classifications or automatically result in discrimination.

Recent decisions have extended the mantle of a "fundamental" interest to the right to employment. *Hicklin, supra*; *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). However, even these cases do not preclude discrimination if there is a substantial reason for the difference in treatment and the discrimination bears a substantial relationship to the state's objective.

Here, there is not a bar to employment. There is no different training benefit afforded because the Petitioner resides out of state. The statute does not deny the Petitioner training because he has relocated.

Petitioner fails to point out that all vocational training plans in California are subject to approval by the Rehabilitation Unit and all are subject to the $16,000 cost limitation of Labor Code § 139.5(c).

Petitioner relies on *Saenz v. Roe*, 119 S. Ct. 1518 (1999). In *Saenz* the Court clearly sets forth the continuing doctrine that the right to travel is constitutionally protected and that a newly arrived citizen is entitled to the same privileges and immunities enjoyed by other citizens of the same State.

The *Saenz* case dealt with a statute which discriminated against citizens who had completed their interstate travel. In *Saenz*, welfare benefits to new residents to the state were limited during their first year of residence. During that first year, benefits were limited to the amount of benefits they would have received in the state of their prior residence. The court in reliance on *Dunn*, *supra* found the classification discriminatory and in itself a penalty to the right to travel.

In contrast this case involves neither actual deterrence to migration nor a lesser incursion to the right to travel. The Petitioner's travel has been completed. He is entitled to reside in Arizona and receive full unfettered vocational training and benefits in California or Arizona. If he wishes to receive benefits in Arizona he merely needs to locate a local program which is cost-effective. He receives assistance from a professional vocational rehabilitation counselor to do that. Even if for some reason his out-of-state plan is deemed not cost-effective, he need only return to California temporarily

for training and then return to his state of residence. In the present case, the Petitioner has only a requirement to show that whatever rehabilitation plan he engages in is going to be appropriate and cost-effective.

What is at issue in this case is neither discrimination based on state alienage nor infringement on the exercise of the right to move into another state and become a resident of that state. The statute creates no difference in the rights afforded employees whether they request rehabilitation services in the State of California or outside the state.

Since there is no classification and the statute does not penalize any fundamental right, the appropriate test for review is the rational basis test.

Labor Code § 4635 establishes that the legislature finds and declares that vocational rehabilitation be provided in an efficient and cost-effective manner. On its face this is a legitimate state interest. Applying the appropriate basis of a rational test review, the State of California has not acted arbitrarily in implementing its legitimate concerns. These are the protection of the state economy and the preservation of the employer's control over traditional labor issues such as training. They are important, legitimate state interests. Accordingly, the legislature has articulated a rational relationship to a legitimate state purpose.

The reform legislation was in response to economic strains which had been placed on employers. It was drafted to limit the migration of employers to other states where costs were not as high. The state's efforts resulted in Labor Code § 4644(g) which provides controls which protect the economy for all citizens.

The Petitioner in this case has set forth a comparison between the delivery of medical benefits and vocational rehabilitation benefits. That distinction is not acceptable. Each is a different class of benefit.

Vocational rehabilitation services are available only when the applicant meets the criteria of a Qualified Injured Worker. It further must be determined that that person would benefit from services. Thus they are completely different benefits with completely different requirements.

With respect to vocational rehabilitation services, the injured worker must attend some type of schooling and/or training to return to the labor market. It is an extremely positive and aggressive role for an applicant. Medical treatment is provided on a passive, as needed basis and it is simply a different benefit. Thus, the case of *State Compensation Insurance Fund v. Workers' Compensation Appeals Board*, 69 Cal. App. 3d 884 (1977), which is cited by Petitioner, is not applicable.

C. Public Policy Considerations

The Petitioner has misstated the effect of California Labor Code § 4644(g). This Section does not free an employer of liability for vocational rehabilitation services outside the State. The employer has the option to agree to the services. If not, a determination can be made by the Unit that out-of-state services are more cost-effective.

The State has a legitimate interest to ensure that insurance carriers and employers retain control of training costs when an individual moves out-of-state. This is a traditional area of employer control and Labor Code

§ 4644(g) provides a mechanism to ensure that rehabilitation benefits are delivered effectively. Obviously, Labor Code § 4644(g) was in response to valid public policy considerations. The economy of the State of California had been severely impacted as a result of uncontrolled workers' compensation costs. The reform legislation was the result of legislative action which balanced both the benefits to the employer and employee and the needs of the state in continuing to provide viable employment and state resources to all residents. The reform legislation was in response to strains which had been placed on employers. It was drafted to limit the migration of employers to other states where costs were not as high. The state's efforts resulted in Labor Code § 4644(g) which provides controls which protect the economy for all citizens.

CONCLUSION

It is clear that the Petitioner in this case, John Vincent, has never attempted to comply with Labor Code § 4644(g). It is also clear that he has not been denied any benefit. The California Courts have ordered this matter back to the Rehabilitation Unit for further proceedings and a determination of the applicability of Petitioner's claim for vocational benefits. Mr. Vincent never went there.

It is clear that the constitutionally protected right to travel has not been interfered with in this case. It is also clear that the Statute is constitutional and the doctrine of strict scrutiny is not applicable. Even if strict scrutiny were applied, the state has a compelling state interest in management of the provision of benefits and protection of the economy and labor market for all its citizens. The statute is tailored to avoid infringing on an employee's legitimate right to travel by

affording the option of an out-of-state program if it is as cost effective. The statute also provides a mechanism to challenge the determination and thus due process is afforded.

It is also clear that this Petition is premature as the Petitioner herein has never availed himself to benefits under the California Labor Code with respect to Labor Code § 4644(g). The Petition should be denied.

Respectfully submitted,

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